No. 2715

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

ONG CHEW LUNG, Also known as ONG GIN LUNG,

Appellant.

vs.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,

Appellee.

Brief of Appellant

Upon Appeal From the United States District Court for the District of Arizona.

STRUCKMEYER & JENCKES
Attorneys for the Appellant.
Phoenix, Arizona

No. 2715

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

ONG CHEW HUNG, Alias ONG GIN LUNG,

Appellant.

vs.

ALFRED E. BURNETT, Inspector in Charge, United States Immigration Office at Tucson, Arizona,

Appellee.

STATEMENT OF THE CASE.

The appellant, a Chinese alien, was arrested by the appellee, Alfred E. Burnett, Inspector in Charge United States Immigration Office at Tucson, Arizona, pursuant to a warrant of arrest issued April 16, 1914, by the acting Secretary of Labor, under Section 23, Act of Congress March 4, 1913, charging the appellant with being unlawfully in the United States in violation of the Chinese Exclusion Law. A hearing was had before the appellee at Tucson, Arizona, on April 23 and 24th, 1914, and on May 5th, 1914, at which hearings evidence was received by the appellee, from which evidence the Secretary of Labor on May 28th, 1914, adjudged the appellant unlawfully in the United States in violation of

the Chinese Exclusion Act and ordered his deportation to the country whence he came.

The appellant thereupon filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, alleging in substance that such finding and order of the Secretary of Labor was against the uncontroverted evidence and without authority in law. The writ having been granted, the appellee made return thereto, setting up the issuance of the warrant of arrest mentioned, the hearing before him and the subsequent order of deportation, and attaching to his return the full evidence taken before him and upon which the order of deportation was based.

The appellant demurred to the return of the appellee upon the grounds that the facts stated in said return do not justify the deportation of the appellant and are not sufficient to show cause why the appellant should not be discharged from detention by the appellee, that the return shows that the appellant was not accorded a fair hearing in that he was arbitrarily found to be unlawfully in the United States without any evidence justifying such finding, and that the order of the Secretary of Labor is and was without jurisdiction. This demurrer was overruled by the District Court, the writ of habeas corpus denied, and the appellant was thereupon remanded to the custody of the appellee. From this judgment, this appeal is prosecuted, and the question therefore presented on this appeal is whether or not the action of the Secretary was fair, regular and lawful, and whether or not the evidence taken before the appellee

and attached to the return and upon which the order of deportation by the Secretary of Labor is based, justifies the finding that the appellant is unlawfully in the United States in violation of the Chinese Exclusion Laws.

The evidence taken at the hearing before the appellee consisted on the part of the Government, solely of the examination of the appellant and of the so-called landing records of the appellant on which he was admitted. From this it appeared:

On November 5, 1902, Ong Hung, was conducting a business under the firm name of Wing & Co., at 210 Jackson Street, San Francisco, claiming to be a merchant. He made affidavit of his mercantile status on this date supported by the affidavits of three white witnesses. The affidavit of Ong Hung stated that Ong Show (the appellant) whose photograph was attached to the affidavit was his son and about to come to the United States and that his affidavit was made to facilitate the son's landing. Upon this affidavit and the affidavit of the three white witnesses, the appellant was landed at the port of San Francisco and admitted on August 14, 1903. (Tr. R. 74, 75 and endorsement thereon.) The appellant was then between seventeen and eighteen years of age. He went to live with his father until the San Francisco fire, going to school. (Tr. R. 44.) The appellant's father's business was destroyed in the San Francisco fire and his father then went to Antioch, going into the vegetable gardening business, to which place the appellant accompanied his father, staying there for about a year attending school,

when in the middle of October, 1907, he went to San Francisco purchasing a partnership interest in the Kim Lun Chong store at 831 Grand Avenue, with money given him by his father. (Tr. R. 46-52.) He immediately became an active member in the store, doing the collecting and purchasing goods for the Company, but doing no manual labor. Of this firm Ong Chee, an uncle of the appellant, was the treasurer. (Tr. R. 46.) The appellant stayed in the store until January 7, 1910, when he left for China on a visit. (Tr, R. 46-53.) Prior to his departure for China, the appellant made application for the pre-investigation of his status as a merchant, and his status as a merchant was investigated and approved. (Tr. R. 65-78 inclusive.)

The appellant returned to the United States and was readmitted at the port of San Francisco on July 27, 1911. (Tr. R. 78-79.) The appellant returned to the Kim Lun Chong store where he stayed for about seven or eight manths and going from there to Salt Lake City, where he stayed for about seven or eight month, returning to San Francisco, staying there for a short period of time and coming to Phoenix, Arizona, in January, 1913. (Tr. R. 47-48-54.) During all this time he was concededly not engaged in any manual labor until August, 1913, when he acquired an interest in a restaurant at Phoenix, Arizona, known as the English Kitchen. He was not engaged in manual labor of any kind, but intended to go into business, but, conditions being unfavorable, he asked Immigration Inspector Parch whether it would be permissible for him to work to which he

received an affirmative answer. Thereupon he acquired the interest in the English Kitchen mentioned, (Tr. R. 58) and while conducting this restaurant he was arrested upon the warrant issued. ,

There is no evidence in the record attacking the father's status as a merchant at the time of the appellant's entry, except this: On March 29, 1914, prior to the appellant's arrest and prior to the issuance of the warrant for his arrest he was subjected to an examination, not under oath and through an interpreter, by the appellee. Being asked the nature of his father's business in 1902 he answered: "He was conducting a factory making shirts and overalls." (Tr. R. 43.) At the hearing, however, before the appellee, the appellant under oath stated that he desired to change this statement, that it was not a factory, but "a store where it has clothing and things like that for sale." (Tr. R. 50, 51, 52.) No steps appear to have been taken to bring about the father's deportation, but, it affirmatively appears that at the time of the hearing he was still living in Antioch, Cal., engaged in gardening. (Tr. R. 39, 40.)

SPECIFICATIONS OF ERRORS.

I.

That the Court erred in overruling complainant's demurrer to the return filed herein by respondent to the writ of habeas corpus, based on the ground that the facts stated in said return do not justify the detention of complainant by respondent and do not justify the depor-

tation of complainant to the Republic of China by respondent and by the Secretary of Labor.

II.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the facts stated in said return are not sufficient to constitute a defense to the petition for a writ of habeas corpus filed herein, and are not sufficient to show cause why complainant should not be discharged from the detention by the respondent.

III.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the respondent and the Secretary of Labor did not accord to complainant a fair hearing in that they arbitrarily found complainant to be unlawfully in this country in violation of law without any evidence whatsoever having been introduced justifying such finding.

IV.

That the Court erred in overruling complainant's demurrer to said return based on the ground that the return shows that the detention by the respondent of the petitioner and the order of the Secretary of Labor in ordering the petitioner deported is and was without jurisdiction.

V.

That the Court erred in denying the application of

complainant for his discharge under the writ of habeas corpus, in discharging said writ, and in remanding complainant to the custody of respondent.

BRIEF OF THE ARGUMENT. POINTS AND AUTHORITIES.

a. The action of the administrative officers of the United States, charged with the duty of investigating the status of the alien, determining the status of the alien as one of the exempt class and permitting him to enter the United States, is prima facie evidence of the alien's right to be and remain in the United States.

Lin Hop Fong vs. U. S., 209 U. S. 463.
In re Tam Chung, 223 Fed. 801.

b. The alien's right to enter and remain in the United States, so determined by the administrative officers of the United States, in a proceeding of this character must be overcome by the United States and unless so overcome the alien's right to be and remain in the United States remains proved. (Sec. 3, Act May 5, 1892, casting upon the Chinese alien the burden of the proof, has no application to proceedings upon departmental warrant.)

Lin Hou Fong vs. United States, supra.
Lew Ling Chong vs. United States, supra.
U. S. vs. Lee Yon Wing, 211 Fed 941.

c. The evidence to overcome such prima facie right so established must be substantial. Mere suspicion, fantastic doubt created, is not sufficient.

d. If in the absence of such substantial evidence

the Secretary of Labor order the deportation of an alien such order is arbitrary and unfair, and subject to review and correction on an application for the writ of habeas corpus.

Whitfield vs. Hanges, 222 Fed. 751.
Ex parte Lam Pui, 217 Fed. 458.
M'Donald vs. Sin Tak Sam, 225 Fed 710.

e. "One lawfully entering the United States can lawfully change his vocation and can labor of right and not of privilege and without incurring the penalty of deportation."

In re Tam Chung, 223 Fed. 803.
U. S. vs. Lew Chee, 224 Fed. 447. (C. C. A. 2nd C.)
U. S. vs. Foo Duck, 172 Fed. 856. C. C. A. 9th C.)
Lew Ling Chong vs. U. S., 222 Fed. 196.

f. The warrant contains no allegation of a fact or facts advising the appellant of the charge against him, and did not, therefore, confer jurisdiction upon the Secretary, or invest the subsequent hearing with that fairness exacted by law necessary to constitute due process of law.

Whitfield vs. Hanges, 222 Fed. 748 (C. C. A. 8th C.).
Ex parte Lew Lin Shew, 217 Fed. 317.

g. The proof offered to be *legally sufficient* must be "of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain" and the Court must examine the proof with both respect to its quality and quantity.

Metropolitan R. R. Co. vs. Moore, 121 U. S. 568.

ARGUMENT.

Should this alien be deported the harshness thereof must forcibly strike the mind. The alien came to the United States in 1902 when a boy less than eighteen years of age, not clandestinely, but brought here openly by his father with the express sanction and approval of the United States. He acquired a residence, a domicile, here. Even Chinese aliens are permitted to acquire a residential domicile within our borders. He lived here continuously for eleven years prior to his arrest, unmolested under the all-seeing eyes of the inspectors. He went to school. In October, 1907, then twenty-two years of age he became a member of the mercantile firm of Kim Lun Chong, 831 Grant Ave., San Francisco, California. He became an active member of the firm and was such on January 6th, 1910, when he made application for pre-investigation to the Immigration Department at San Francisco. He was pre-investigated, most searchingly it would appear from the record, and his status as a merchant was approved. He departed for China on a visit and was readmitted as a merchant on July 27th, 1911. Now it is sought to deport him to the land of his nativity. Why? Because it is claimed his original entry in August, 1903, was fraudulent, that his father was not then in truth a merchant but a factory-owner—a laborer—and as such not entitled to have his minor child admitted, and that at the time of his arrest he was found laboring. The latter reason is wholly dispelled by the now universally

accepted rule that the merchant may labor when forced to do so.

That eleven years after his entry he was found laboring means nothing. Judge Morrow said,

> "But, when the Chinese person has obtained admission lawfully under the statute, and without any trick, deception, or fraud has become domiciled in the United States for a period of seven years, we do not see how he can be deported if during that time he has been found temporarily performing acts of labor."
>
> U. S. v. Foo Duck, 172 Fed. 856.

He had been a merchant for years, this must be conceded, the official findings of the immigration officers clearly prove this; he returned for a visit to China; he was re-admitted; he stayed for some time in the store of which he was a member; business was poor and he came to Phoenix to open a store;

> "but seeing that time was not good for to open in business and I had asked Inspector Partch whether it would be permissible for me to work and he replied in the affirmative." (Tr. R. 58.)

This is not to be denied. If Inspector Partch had not made this statement to the alien surely it would have been denied by him. Inspector Partch understood the alien's condition and evidently he but explained the law to him.

We therefore are forced back to find an excuse for the order of deportation to a possible claim that the alien's father was not a merchant in 1903 at the time of the alien's first entry. The Secretary may deport within three years after the entry of the alien. May he

search back eleven years to find cause of deportation in the father's status? We doubt the propriety thereof.

But it is immaterial here, for the record is wholly barren of evidence impugning the father's status as a merchant. Momentary suspicion only is cast upon his status by the statement made by the alien some time on March 29th, 1914, (not at the hearing) that his father was, at the time of the son's entry, (in 1903) "conducting a factory making shirts and overalls" of which he was the owner. This statement was made to the inspector at the inspector's request for a statement, and through an interpreter. (Tr. R. 38, 43.) At the hearing in this proceeding the alien testified under oath concerning this statement.

Q. "Do you desire to make any changes in the testimony given by you at that time?"

A. "At that time I stated that my father's business was a factory for manufacturing clothing, but in reality it was not a factory; it was a store where it has clothing and things like that for sale." (Tr. R. 50, 51.)

The alien further testified that he was mistaken when he stated to the Inspector that his father's place of business was a factory; that it was a long time since and that he did not remember. It must be borne in mind that the appellant had not worked in his father's place in San Francisco, but went to school. (Tr. R. 44.)

In the face of this explanation this Court certainly cannot assume that an alien, a Chinese alien, could, in the City of San Francisco, conduct a large establishment in a manner rendering him subject to deportation and remain immune from deportation by the immigra-

tion officials. To assume this we must also absolutely assume that the immigration officials were corrupt in the discharge of their duties.

Immediately after the fire the father moved to Antioch, California, and became a laborer. He is still in Antioch, no steps whatever have been taken to secure his deportation. Why not? If the entry of the son in 1903 was unlawful it can only be because his father was then in this country in violation of law and subject to deportation. Were all the immigration officials at San Francisco asleep? Not merely slumbering but willfully closing their eyes?

Of both the father's and the son's presence in the United States since 1902, as affecting the son's present right to remain, based on the claimed illegality of the father's presence, it may fitly be said:

> "If he was unlawfully within the country in 1910 (1902) it was the duty of the officials of the government to have taken steps at that time to have him arrested and deported. The fact that during this *long period of inaction* the government made no move against him *implies a lack of confidence* in *its case.*"
>
> Judge Sanborn in: U. S. vs. Lee You Wing, 211 Fed. 946 (C. C. A. 8th C.)

This alien lived with his father on the ranch at Antioch until October, 1907, when on arriving of age he became a member of the Kin Lung Chong store of which he is now a member. He was a member of that firm, actively engaged as a member in the business of the firm, when, in January, 1910, he made application for pre-investigation on his intended departure from the

United States, then claiming his status as a merchant. To support his claim he gave the names and furnished the affidavits of three white witnesses that he was a member of the exempt class, in addition to the affidavit of Ong Chee, manager of the store. His claim as merchant was thoroughly investigated by the inspectors, the witnesses and the store were examined, (Tr. R. 66 to 77) with the result that Edward L. Lawman, Chinese Inspector, reported to the inspector in charge that "the mercantile establishment of which this alien is a member is a genuine mercantile establishment and that the status of the applicant as a merchant has been established" and recommends favorable action. (Tr. R. 66.) We then find the following,

> "Port of San Francisco, California, January 6th, 1910. The application of the within named Chinese has been investigated and his mercantile status for one year prior to the above date has been established." (Signed) Chas. Mehan, Inspector in Charge. Approved: F. M. Crawford, Acting Commissioner of Immigration. (Tr. R. 77.)

His departure as a merchant and his right to re--enter the United States as a merchant is investigated by the officers of the United States charged with the duty of so doing. Upon the faith of this finding the alien departs, he returns to the United States and is re-admitted by the Immigration Officials charged with the duty of then again investigating his right to re-enter. Shall the alien now be deported upon the mere suspicion that his father in 1903 may have conducted a factory for the manufacture of shirts and overalls instead of a store for the sale of shirts and overalls? The latter is

the testimony in this case, the former the suspicion cast of which no evidence whatever has been introduced except the extra-judicial statement of the alien, later denied and explained, and which is wholly refuted by the conduct of the United States in acquiescing for a number of years in the legality of the status of the parent.

Is this bare admission, later denied under oath, and the force of which is wholly destroyed by the action of the officials of the United States, substantial evidence? Judge Connor in Ex parte Lam Pui, 217 Fed. 457, has very clearly stated the true meaning of the term, adopting the following definition of evidence:

> "Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied." Draft, Code.

After reviewing the authorities Judge Connor holds that unless such evidence is in the record the order of deportation is subject to review on habeas corpus.

Ex parte Lam Pui, 217 Fed. 467.

This alien came to the United States when less than eighteen years of age, he is now past thirty; as well said by another District Judge: Deportation in this case would be tantamount to expatriation, banishment. Instead of being an honest enforcement of the laws of the United States it is the overzealous endeavor of the servants of the United States to force a deportation wholly devoid of justice and merit.

In many respects this case is not unlike United States vs. Lee Yon Wing, 211 Fed. 939, wherein the Circuit Court of Appeals for the 2nd Circuit, refused the depor-

tation of a Chinese alien whom they found to have been a merchant, but who had become the owner of a laundry; nor in many respects unlike United States vs. Lee Chee, 224 Fed. 448, decided by the same court, refusing deportation of a Chinese alien laborer, though his right to remain, based on a communicated status, appears from the opinion to have been somewhat doubtful.

The Government called no witnesses, introduced no evidence, other than the examination of the appellant. Though the Government be not foreclosed from questioning the verity of his testimony, this is certain: you may not take therefrom an isolated word here and there, seeking therewith to construct an artifice upon a base of doubt, but the entire testimony must be "of such character and *volume* that it might well satisfy the rational mind of the position it is introduced to maintain" (121 U. S. 568), only then is it *legally sufficient*.

Several questions of law arising on this appeal, and the points whereof have been stated, are likewise involved in No. 2714 and we are content to rest upon the argument of the same therein made, craving the indulgence of the Court so to do.

Respectfully submitted,

STRUCKMEYER and JENCKES,
Attorneys for Appellant.